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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ANTOINE LASHAWN STEWART,

Defendant and Appellant.

C094990

(Super. Ct. No. CRF21-00723)

Appointed counsel for defendant Antoine Lashawn Stewart has asked this court to review the record to determine whether there exist any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Our review of the record has disclosed an error in defendant's favor concerning imposition of the restitution and parole revocation restitution fines. We modify the judgment to correct the error and otherwise affirm; no new abstract of judgment is needed.

## BACKGROUND

An information charged defendant with burglary (Pen. Code, § 459; count 1);<sup>1</sup> possession of methamphetamine (Health & Saf. Code, §11377; count 2); and possession of a device used to smoke a controlled substance (pipe) (*id.*, § 11364; count 3). The information further alleged defendant had suffered a prior strike (§§ 667, subd. (d), 1170.12, subd. (b)). Count two was dismissed prior to trial.

At trial, the People presented the testimony of a witness who had heard two loud bangs while sitting in his car outside a fourplex and then had seen a person leaving the basement of the fourplex. The witness then saw a man drinking from a water fountain 15 to 20 feet away; when asked to leave, the man picked up two paintball guns and a bike tire and walked away.

Another witness testified that upon her arrival at her home, she was told about a possible break-in to her basement and saw a man she identified as defendant walking away from her home with a custom paintball gun that she knew belonged to another. The paintball gun's owner testified he was the only person with access to the basement, the wood securing the locks to the basement door had been broken, and he was missing a custom set of paintball guns and a bike tire. He did not give anyone permission to remove the missing items from his basement and never kept those items outside. The missing items were returned about 10 minutes after he called the police, and he was able to confirm they were his because he had previously spent approximately 50 hours working on the paintball guns.

A law enforcement officer testified he had responded to the burglary report and located defendant with the stolen items less than a minute away from the burglary scene.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

The officer arrested defendant and searched him, locating a glass pipe used to smoke methamphetamine in his front pocket.

Defendant testified that he had been getting a drink of water from a nozzle on a garden hose when a woman came out and asked him to leave. He then tripped over what he thought was a broken paintball gun on the ground and picked it up, taking it with him. He denied knowing about a basement or having gone in one. He added that he had the bicycle wheel with him the whole time. On cross-examination, he admitted possessing the glass pipe.

Following instruction and argument, the jury found defendant guilty on both counts; in a bifurcated proceeding, the trial court found true the prior strike allegation.

At sentencing, the trial court declined to dismiss the prior strike and sentenced defendant to the low term of two years in prison on the burglary count, doubled to four years due to the strike, and six months concurrent for the pipe. The court awarded defendant a total of 245 days custody credit, and imposed a \$300 restitution fine (§ 1202.4, subd.(b)) and a (matching) suspended \$300 parole revocation fine (§ 1202.45) on the burglary count, plus a \$150 restitution fine with a suspended \$150 parole revocation fine to run “concurrent” to the felony fines. The court reserved jurisdiction on restitution and imposed minimal fees.

Defendant timely appealed. The case was fully briefed and assigned to this panel in April 2022.

### **DISCUSSION**

Counsel filed an opening brief that sets forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief but did not do so.

Our review of the record has disclosed that the trial court imposed a restitution fine for each count, rather than one per case. While the court may certainly consider the number of counts in calculating the total restitution fine to be imposed per case (see § 1202.4, subd. (b)(2)); here, the court's imposition of a two separate sets of minimum fines and direction that they run concurrent indicates separate fines per count, which is improper and unauthorized. (See *People v. Soria* (2010) 48 Cal.4th 58, 66 [restitution fines are to be imposed in each *case* resolved by a plea bargain]; *People v. Sencion* (2012) 211 Cal.App.4th 480, 483 [restitution fine may be imposed only once per case].)

We will modify the judgment to strike the two \$150 fines; because these amounts are already omitted from the amended abstract of judgment, no amendment of that document is necessary. Finding no other arguable error resulting in a disposition more favorable to defendant, we affirm the judgment as modified.

#### **DISPOSITION**

The judgment is modified to strike the \$150 restitution fine and matching suspended \$150 parole revocation restitution fine; the judgment is otherwise affirmed.

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/s/  
Duarte, J.

We concur:

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/s/  
Hull, Acting P. J.

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/s/  
Renner, J.